The Conundrum of 'Relevant Market': Market Definition in India's Complex TV Distribution Business

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Abstract *The universal problematic of market definition poses peculiar challenges in multi-lingual and fragmented media markets, like in India. This article engages with this problematic by taking up the case of the TV distribution market in India. Here, the rapidly expanding TV distribution business consists of two segments. The larger, wired Cable distribution segment, driven by over 1,000 large cable companies and over 50,000 last mile operators, accounts for 70 percent market share, or around 100 million TV homes. The rest 30 percent is occupied by the wireless segment, comprising 6 Direct to Home TV distributors. Amidst the heightened expansion of the TV distribution business during the last decade, we notice a series of cases at the Competition Commission of India (CCI) pertaining to 'relevant market'. This paper provides a critical appraisal of CCI's engagement with ideas of relevant geographical market and relevant product market during the first five years of such matters coming to it, i.e. between 2011 and 2015. Focussing on core concepts deployed in debating relevant markets, viz. substitutability and service area, the paper unravels conceptual and methodological challenges provoked by market definition in complex media landscapes such as India.*

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I. Introduction

In January 2019, the Competition Commission of India approved two subsidiaries of Reliance acquiring majority stake in two of the three largest Cable TV distributors, Hathway and DEN.[1] This spurred anxieties across both segments of the TV distribution business, viz. in the segment of 'wired' or Cable distribution and in the relatively smaller segment of 'wireless' or Direct to Home ('**DTH**') distribution. Their anxieties stemmed from the near-monopolistic situation arising from these giant acquisitions by Reliance in the overall TV distribution business--- that is, in the market for retailing TV channels. These anxieties were enhanced on count of Reliance, India's biggest industrial conglomerate, also controlling wide interests in the TV broadcast business--- that is, in the market for producing TV channels. However, the Competition Commission of India ('**CCI**') did not see Reliance's large inorganic expansion into the TV distribution business carrying risks of market dominance in that business. The crux of CCI's argument was that the businesses of Cable distribution and DTH distribution operate in the same 'relevant product' market[2]--- that is to say, they distribute substitutable products. CCI was suggesting that arguments of market dominance by an entity in India's TV distribution business must consider its share in both the Cable business and in the DTH business. It thus opined the market share of Reliance, despite acquiring two of the three biggest companies in the Cable segment, did not indicate its dominance in the 'relevant market' of TV distribution--- which it felt was an amalgamation of the Cable and the DTH segments.

Rather than further reasoning, or contesting, the wisdom of CCI's judgement, there is another purpose to invoke this case at the outset of this essay. The CCI's wisdom makes us ponder over two, often intertwined, problematics debated globally in media policy studies, competition law, and in media economics. The first is at the empirical level, about enumerating 'dominance' in a media market; and thus, whether the combined market share of the Reliance subsidiaries, if taken as one actor operating in the market, dominate the Cable business. The second problematic is at the conceptual level, and therefore more fundamental, about defining 'the market' where such

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[1] Competition Commission of India (Combination Registration Nos. C-2018/10/609 and C-2018/10/610) 21 January 2019.
[2] ibid 7.

dominance is alleged. It raises the question whether the TV distribution business in India, comprising two different, technologically-defined segments, can be construed as one uniform and singular market. This essay delves into the second problematic, that of the very conception of market definition---commonly termed as the problematic of relevant market. The essay explores this in the context of the dynamic business of TV distribution in India.

II. The Context: The Business of TV Distribution

The TV landscape in India reflects the legacy of the country's mixed economy. On the one hand, the state continues its monopoly over broadcasting (TV channels) in the Terrestrial mode. Viewers do not pay to receive such TV channels, which is why terrestrial transmission of government-owned TV channels is referred to as 'free-to-air' broadcasting. On the other hand, viewers pay to receive private-owned TV channels transmitted in the Cable and Satellite mode. This business of Cable and Satellite TV ('**C&S TV**') comprises two sectors: one, the TV broadcast sector which consists of the market for producing and broadcasting TV channels; and secondly, the TV distribution sector which entails the market for distributing and retailing TV channels.

Two aspects of this commercially and technologically hybrid TV milieu are important to point out here, since they bear on conceptions of market definition.

One, TV distribution takes place through two technologically different ways: through wired networks, commonly referred to as Cable operations, and through wireless networks, widely termed as Direct-to-Home operations.[3] Thus, the TV distribution sector of the overall C&S TV business comprises two different segments, that of Cable and DTH. While Cable operations account for 58 percent share of the overall TV Distribution sector---around 103 million TV homes---the rest is occupied by DTH operations.[4] The Competition Commission of India was confronted to address whether these two technologically distinct segments of the TV distribution business signified two separate relevant markets, or represented one integrated market.

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3 The introduction of wireless distribution through DTH operations in 2006 expanded access to C&S TV in two significant ways. It enabled access in geographically remote areas, which wired Cable distributors were unable to service, as also to demographically sparse areas, which Cable distributors found cost ineffective to service.

4 Telecom Regulatory Authority of India, 'Annual Report 2018-2019' (November 2019) 31.

Secondly, regulatory stipulations require TV distributors to carry, besides private C&S TV channels, a minimum number of government owned terrestrial TV channels. Consequently, there appear to be two audience markets in India's TV business--- audience receiving only government TV channels in the free to air terrestrial mode, and those receiving private C&S TV channels and government TV channels provided by the TV Distributor they subscribe to. This, in turn, seems to create two markets for advertising--- a contention the Competition Commission of India was obliged to grapple with.

Over the last 15 years, revenues in TV Distribution sector, realised from subscriptions by viewers, have expanded tremendously. Their growth has been steady and at higher rates than the growth of revenues in the TV Broadcasting sector, realised overwhelmingly from advertising. Yet, TV Distribution remains a far less studied area than TV Broadcasting. Very little is known about the workings of wholesale and retail markets in distribution, the impact of regulatory interventions on this sector of the TV business, evolving ownership patterns and market structure, and about interactions between the subscriber-audience and distributors.

In the value chain of C&S TV distribution, the principal entities are multi-system operators ('**MSOs**') which aggregate signals from numerous broadcasters and relay them across large areas. Although MSOs are licensed at the national level,[5] many are often called 'regional' since they operate either within a state or in contiguous states. A handful are referred to as 'national', like Hathway and DEN (now controlled by Reliance), since their operations spread across many, non-contiguous states. Below the MSOs in the value chain are small Cable distributors called last-mile operators ('**LMOs**'); they relay signals acquired from MSOs to the homes of subscribers of C&S TV. Typically, MSOs exercise market power in negotiations with the LMOs, on the one hand, and with the broadcasters on the other. They leverage their accumulated interests to bargain with broadcasters for content at a lower price, while also demanding higher carriage and placement fees to carry channels. Often leveraging this, MSOs are simultaneously able to offer better revenue share to LMOs, as also dangle incentives for LMOs to move away from smaller MSOs or large independent Cable distributors and align with larger MSOs.

[5] MSOs require a license whose criteria include, irrespective of their area of operation, the applicant entity having a minimum net worth; in contrast, the commercially far smaller and spatially localised LMOs have not attracted any licensing or financial stipulations, and are only required to register themselves at the nearest Post Office.

The mandatory digitalisation of Cable, introduced through legislation in 2011 and rolled out in 5 phases,[6] led to Cable operators being able to relay more channels, provide on-demand pay-per view programmes, and offer bi-directional services, such as broadband internet. Early evaluations reveal mandatory digital migration playing out unevenly across cities, and across social strata within a city.[7] While the move from analog to digital Cable in large (Tier 1) cities like Delhi, compared to say Tier-2 cities like Patna, began much before mandatory digitalisation was legislated, in both cases digital migration was slow among low income households.[8] Since digitalisation required incremental investments from MSOs and LMOs, many Cable operators who could not afford this exited, making this sector of the TV market less long tailed. As a result, today over 1000 MSOs exist--- down from over 5000 before mandatory digitalisation commenced. More significantly, 15 large MSOs control over 75 percent share of the Cable distribution market.[9] On its part, estimates on LMOs remain unclear since the Ministry of Information and Broadcasting ('**MIB**') has never released, perhaps never bothered to collect, a list of Cable operators registered at post offices across the country; all we have are 'industry estimates' that have for a decade been hovering around 50,000. But these numbers have reduced post mandatory digitalisation, since many LMOs sold out to, or became franchisees of, large MSOs in urban India.[10] At the same time, in some cities MSOs came to garner more than 80 percent of the Cable business; while in some states, a single entity came to acquire several MSOs and LMOs.[11]

Apart from Cable, the other segment of the TV distribution business consists of DTH operators who account for 72 million subscribers, or about 42 percent of the TV Distribution sector.[12] Being a wireless service, DTH operators are able to distribute TV signals all across the country, thus enabling them to have a national 'footprint', or area of operation. In sharp contrast to Cable, the public broadcaster had commenced its own DTH service; being rent-free is one reason why its users, initially limited to marginal social

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6 The Cable Television Networks (Regulation) Amendment Act 2011.

7 Vibodh Parthasarathi, Arshad Amanullah, and Susan Koshy, 'Digitalization of TV Distribution: Some Findings on Affordability & Availability' (2016) 51(34) Economic and Political Weekly 20 August, 23-26.

8 ibid 25.

9 Telecom Regulatory Authority of India, 'White Paper on The Telecommunication (Broadcasting and Cable) Services: Benefits of 'New Framework' for Small MSOs' (23 April 2019) 12.

10 Vibodh Parthasarathi, Arshad Amanullah, and Susan Koshy, 'Digitalization as formalization: A view from below' (2016) 7(2) International Journal of Digital Television 155.

11 Telecom Regulatory Authority of India, 'Consultation Paper on Monopoly/Market Dominance in Cable TV Services' (3 June 2013).

12 TRAI (n 4) 31.

strata and geographically remote pockets, have been expanding over the past years.[13] Private DTH operators, unlike Cable operators, were obliged to seek a license. At its peak, there were 8 private DTH operators, which have since reduced to 5 due to consolidation. Like in Cable after mandatory digitalisation, different DTH operators have been using set top boxes of different technical specifications (compression and encryption)--- a regulatory lacunae which makes these competing wireless TV distribution services non-interoperable, a matter also noted by CCI and which we will return to.[14] This compels subscribers to bear migration costs to a rival DTH operator if services of the incumbent are found wanting.

This reminds us of the significant risks prevalent in TV Distribution in India.[15] In the context of this essay, four such risks are important to highlight. First, the regulatory cap of 20 percent vertical integration between an MSO/DTH operator and a C&S TV broadcaster has been widely circumvented by exploiting legal loop holes in the Companies Act, despite its revisions in 2013. This has resulted in leading TV distributors to cross-own and/or control TV Broadcasters (and vice versa) through subsidiaries, step-down subsidiaries, and group companies.[16] Second, LMOs had historically carved out their local areas of operation, leaving C&S TV homes no choice but to subscribe to Cable relays of the LMO ruling a particular locality[17]--- unless they chose to subscribe to DTH services. While one of the regulatory aims of mandatory digitalisation was to provide choices to subscribers of C&S TV, the effective monopoly of LMOs in the last-mile has curtailed subscribers to choose between Cable and DTH--- and not between competing Cable services. This brings us to the third risk, that arising out of the lack of inter-operability between set top boxes of competing DTH operators--- despite the sectoral regulator, TRAI, repeatedly emphasising DTH licensing conditions mandate such a provision.[18] Consequently, unless subscribers invest in set

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13 Aloke Thakore and Sevanti Ninan, 'When the Dish Knocked Down the Antenna', (2016) Working Papers id:10554 eSocialSciences <https://ideas.repec.org/p/ess/wpaper/id10554.html> accessed 13 June 2020.

14 For a snapshot of different formats adopted by leading DTH vendors, *see* Vibodh Parthasarathi and others, *Mapping Digital Media: India* (The Open Society Foundations, London) 89, Table 16 <https://www.opensocietyfoundations.org/reports/mapping-digital-media-india> accessed 13 June 2020.

15 These risks are important to recognise since the distribution sector is widely considered as '*the key locus of power and profit*' in content industries; Nicholas Garnham, *Capitalism and Communication: Global Culture and the Economics of Information* (Sage, 1990) 162 (original italics).

16 Parthasarathi and others, 'Mapping Digital Media: India' (n 14) 8.

17 Veena Naregal, 'Cable communications in Mumbai: Integrating corporate interests with local and media networks' (2000) 9(3) Contemporary South Asia 289.

18 Telecom Regulatory Authority of India, 'Recommendations on Licensing Issues Related to DTH' (25 August 2006).

top boxes of competing DTH operators, they are locked-in with incumbent ones. This then makes the DTH segment bereft of perfect competition. This phenomenon, together with the effective monopoly of LMOs, conveys the nature of competition characterising TV distribution as a whole being rather alarming. The fourth risk is that of rampant political ownership in the Cable business. Since Cable relays entail the laying of wires across neighbourhoods and pockets of city, and engender local information environments, politicians have congenitally been drawn to this business--- as partners/ investors in the business of LMOs/MSOs, or as Cable entrepreneurs themselves.[19] Political ownership/control of Cable operations has commonly led to the relay of particular TV channels/programs being blocked when the programmes they carry threaten or unmask the interests of concerned politicians or their political parties.[20] Elsewhere I have reasoned the persistence of such risks in terms of the 'considered silence' characterising TV regulation in India--- i.e. the wilful non intervention of the state despite the social risks evident in the behaviour of market and extra-market actors.[21]

Our overview of the core traits of the Cable and DTH segments hints at the many conflicts we may expect in the fast expanding but cut-throat distribution business. Equally, and often consequently, this would indicate the many reasons why engaging with the idea of relevant market could be determinate of the health of India's TV distribution business. While there have been periodic concerns about market power in this business, systematic examination of this methodologically necessitates grappling first with the conundrum of 'relevant market'. Last but not the very least, since digitalisation enables MSOs to additionally offer broadband services, debates on market definition in the TV distribution business are crucial to concerns in this segment of India's online economy--- a business which prior to mandatory digitalisation was effectively distinct from the TV Distribution business.

[19] Vibodh Parthasarathi, and Alam Srinivas, 'Problematic Ownership Patterns: The Evolution of the Television Distribution Networks in India' (2019) 54(12) Economic and Political Weekly 23 March 2019.

[20] For instance, *see* Padmaja Shaw, 'Public Sphere and the Telangana Movement', (2014) 152(1) Media International Australia 143; Maya Ranganathan, 'Television in Tamil Nadu Politics' (2006) 41(48) Economic and Political Weekly 2 December 2006.

[21] Vibodh Parthasarathi, 'Between Strategic Intent and Considered Silence: Regulatory Imprints in the TV Business' in Adrian Athique, Vibodh Parthasarathi and S.V. Srinivas (eds) *The Indian Media Economy* (vol 1, Oxford University Press, 2018).

III. The Setting: Institutional Contexts of Market Definition

The intriguing silence in India on regulatory protocols on market share and on an agreed understanding of 'market definition' has ignited a glut of disputes over abuse of competition and market power in the TV distribution sector. These disputes have involved all types of players in the TV distribution business viz. private and public DTH operators, LMOs of different sizes, and regional and national MSOs. Typical disputes coming to the Competition Commission of India (CCI) have been between MSOs and LMOs, between MSOs and DTH operators, between one or more MSO/DTH operator and one or more broadcasters. In adjudicating over these disputes, the CCI has had to repeatedly grapple with the conundrum of 'relevant market'--- the field where a situation for abuse of market power may occur, and which hence requires accurate conception before commencing to resolve disputes in the competitive milieu.

Market definition serves as an analytical tool to identify competitive constraints; clearly defining the relevant market helps identify products/services whose suppliers are capable of exerting effective competitive pressures and constraining each other's behaviour.[22] In short, market definition helps in assessing the competitive constraints a firm faces. This led policy scholars to see demand substitution being the single most important factor to define a market as a market in itself.[23] This is particularly important towards grappling with the dynamics of the TV broadcasting and distribution business in India since its market is demarcated as much by products---i.e. TV programmes in a *particular* language---as it is defined by geographical boundaries, i.e. based on the spatial operations of LMOs and MSOs but also of specific regional offerings by DTH operators. Consequently, in understanding conceptions and rationales of market definition this paper finds itself engaging with the key economic, organisational, and technological traits of the business of TV distribution in India.

In India, the concept of relevant market was defined in the Competition Act, 2002, which also established the Competition Commission of India in 2009. The CCI was set up as a quasi-judicial body with the purpose of preventing practices having an adverse effect on competition, promoting and

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22 European Commission, 'Market Definition in the Media Sector- Economic Issues: Report by Europe Economics for the European Commission, DG Competition' (Information, communication and multimedia Media and music publishing, November 2002).

23 Jan van Cuilenburg, (2002) 'The media diversity concept and European perspectives', paper presented at the Media Economics, Content and Diversity Seminar, Finnish Academy of Sciences, Helsinki (16 December 2002).

sustaining competition in markets, protecting the interests of consumers and ensuring freedom of trade carried on by other participants in markets while sustaining economic development. The CCI took over from the erstwhile Monopolies and Restrictive Trade Practices ('**MRTP**') Commission that was the closest to an anti-trust body in independent India. Its legal instrument, the MRTP Act, was revoked since the government felt an 'incompatibility between the liberalized regime and previous policy instruments such as MRTP'.[24] For instance, the MRTP Act did not discuss predatory pricing, which demands a clear understanding of relevant market. Like the MRTP Commission, the CCI also has a multi-sectoral remit; it is mandated to promote and protect competition in all sectors by curbing business practices adversely affecting competition and protecting the interests of consumers. For the most, disputes adjudicated by the CCI have pertained to anti-competitive agreements and abuse of market power. Contesting parties aggrieved by a CCI judgement have the option of approaching its appellate arm, the Competition Appellate Tribunal ('**COMPAT**').

Apart from the Cable and DTH segments of TV distribution, the CCI has been adjudicating competition in a plethora of economic activities, from real estate to the stock market.[25] As per procedure, upon receiving a complaint by an informant party ('**IP**') under s. 19 of the Competition Act, the commission first considers whether there is a prima facie case and then investigates the matter under s. 26 (1) of the Act. The issue of abuse of dominant position and making anti-competitive agreements is determined after the investigations reveal the relevant market (s. 2 (r), (s), (t) of the Act) of the party concerned. This is the stage when market definition as an analytical tool comes into play.

Relevant markets or antitrust markets are defined in competition law to assess the likely effects of dominance in the competitive milieu. Thus, relevant markets are not defined for their own account, but as a tool to the effective execution of competition policy.[26] The purpose of defining a relevant market is to establish whether a firm or a group of firms has shown or can show market power. Defining the relevant market helps the CCI demarcate products/services whose suppliers are capable of exerting pressures on each other. Once demarcated, the CCI ascertains whether the supplier held a

24 Thankom G. Arun, 'Regulation and Competition: Emerging Issues in an Indian Perspective' (2003) Working Paper Series No. 39, Centre on Regulation and Competition, University of Manchester (October), 8.

25 For example, a heavy penalty of Rs 550 million was imposed on the National Stock Exchange and Rs 6300 million on DLF Ltd., a leading real estate firm, for abusing their dominant position in the stock exchange services and real estate sectors respectively.

26 European Commission (n 22) 101.

dominant position in the concerned market and, if so, whether it is guilty for abusing its position. Such abuse of market power could be by predatory pricing, tie-in arrangements, exclusive supply agreements or other mechanisms declared to be anti-competitive under s. 3 of the Act. Along with s. 4 of the Act, relevant market is undoubtedly a fundamental issue in the adjudication of 'abuse of dominance'.

Establishing a robust argument for market power or abuse of dominance necessitates accurately identifying the product being sold and the territoriality of the market it spawns. A *Relevant Market* has been defined under the Act as the market, determined by the Commission, with reference to the relevant product market or the relevant geographic market, or with reference to both the markets.[27]

Relevant geographic market means a market comprising the area in which the conditions of competition, for supply or demand of goods or services, are homogenous and can be distinguished from the conditions prevailing in neighbouring areas.[28] In the context of the C&S TV business in India, this largely concerns competing distribution and relay of television signals within the physical territory served by a Cable operator and the footprint of a DTH service--- i.e. the service area of a TV distributor.

Relevant product market means a market comprising all those products or services regarded as interchangeable or substitutable by consumers, by reason of characteristics of the products or services, their prices, and intended use.[29] The TV business in India comprises two overlapping audience markets, one each on C&S TV and on free to air Terrestrial TV. Thus, in the case of C&S TV, it is fundamental to identify the particular product (TV channels) being distributed and the kinds of substitutability audience can avail, before defining a relevant product market. Simply viewing 'content' to be the generic product being distributed obfuscates differences between the types of commodities being distributed by Cable and DTH operators. For instance, TV programmes, advertisements, and on-demand movies convey different types of content. On their part rent free C&S TV channels and paid C&S channels also convey different types of 'products'--- something the European Commission has repeatedly held due to it differentiating between un-subscribed and subscribed content.[30]

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27 Competition Act 2002, s 2(r).
28 Competition Act 2002, s 2(s).
29 Competition Act 2002, s 2(t).
30 Natascha Just, 'Measuring Media Concentration and Diversity: New Approaches and Instruments in Europe and the United States' (2008) TTLF Working Paper No. 2, Transatlantic Technology Law Forum, Stanford/Vienna, 8 <https://law.stanford.edu/

The paper provides a critical appraisal of CCI's engagement with conceptions of relevant geographical market and relevant product market in the TV distribution business. The corpus of cases considered are between 2011, when such matters first came to the CCI, and 2015, when the vast majority of Cable homes came to be mandatorily digitalised. In this period, we identify cases coming to the CCI pertaining to the Cable and DTH business to lay out the gamut of issues triggered around the problematic of relevant market. In doing so, the paper spotlights the conceptual challenges grappled by the CCI in understanding the relevant market in the wired and wireless segments of TV distribution.

Our narrative brings out why the CCI's adjudication necessarily depends on the specific nature of the product in question. For one, the cases bring out the pitfalls of viewing the programming offered by TV broadcasters ('content') to be the only product being distributed, since this obfuscates differences between the types of commodities constituting the business of commercial C&S TV--- which also include advertisements/airtime and on-demand programming. Secondly, the cases point at the role of language in defining the product/content distributed--- and hence the boundaries of a linguistic geography where a particular product would find its market. The presence of multiple, large, and often overlapping language markets in India is what imparts a complexity that sculpts the unique personality of its media economy as a whole.[31] These two factors, commodity-types and their language, ought to be brought together to evaluate whether the product distributed by Cable and DTH operators is substitutable or not.

But we also come across the problem of substitutability between Cable and DTH as distribution services. Cases analysed in this paper reveal geographical boundaries, and hence the market in question, being defined in different ways by Cable and by DTH. While the *area of operation* of a Cable operator is defined by the contiguous physical territory where its wired service can retail signals, that of the wireless TV distributor (DTH operator) is defined by the footprint of its signal--- which is effectively all across India. However, the market is defined not only by the area of operation alone; it is defined by the market for particular products within an area of operation. Thus, it is the aggregate and conditional outcome of all three factors together--i.e.

wp-content/uploads/sites/default/files/publication/205108/doc/slspublic/just_wp2.pdf> accessed 13 June 2020.

31 Vibodh Parthasarathi, 'Market Dynamics of the Indian Media Economy' in Adrian Athique, Vibodh Parthasarathi, and S.V. Srinivas (eds), *The Indian Media Economy* (vol 2, Oxford University Press 2018) 1-22; Also *see* S.V. Srinivas, 'Region in Focus' (2015) 6(2) Bioscope: South Asian Screen Studies vii.

commodity, language, and technology--- rather than any one by itself, that needs to be nuanced before identifying the relevant market. Failing to place due weight on any one of these may lead to inaccurate adjudication; this could result in the CCI ignoring all these nuances, like it appears in the *Reliance* case evoked at the outset, or take some disputes for appeal at the COMPAT.

Discussions in the following section highlight the reasoning deployed by the CCI in variedly ascertaining the relevant geographic market to be a particular state/region within India, or a contiguous group of states/regions, or the entire country. The subsequent section delves into disputes squarely concerning relevant product market to show how/why the CCI argued the substitutability, or otherwise, of the two principal distribution platforms, viz. Cable and DTH. The paper then pulls together the conceptual and empirical challenges provoked by market definition in India's complex landscapes of TV distribution.

IV. The Territoriality of Distribution: Relevant Geographical Market

One of the first movers in the Cable business was the Sumangali Cable Vision whose affiliate companies included not only one of India's earliest multi-lingual broadcast network *(SUN TV)* but also a first mover in the DTH business, Sun Direct. Operating largely in southern India, Sun Direct was accused of employing anti-competitive practices in *Jak Communications* v. *Sun Direct* ('**Jak Communications**').[32]

The OP in this case, Sun Direct, introduced a package of channels, 'Tamil Freedom Package', for Rs. 440 for four months with a subscription fee of Rs. 99 per month. The informant, Jak Communications, a large MSO in South India, accused Sun Direct of attempting to eliminate all other players in its area of operation through predatory pricing by charging lower monthly rent (Rs. 99) than the then basic price (Rs. 156.55). It also accused Sun Direct of having an anti-competitive agreement with subscribers[33]--- a practice aided by Sun Direct's dominant position in the overall TV distribution market. By supplying set top boxes at highly reduced prices, Jak Communications alleged that Sun Direct was causing an appreciable adverse effect on competition in the southern states of India and was foreclosing competition in the

[32] *Jak Communications v Sun Dire*ct, Competition Commission of India Case No. 08/2009.

[33] Sun Direct was alleged to provide Set-Top Boxes, costing Rs 2,200, free to its subscribers.

arena. All in all, the practices of Sun Direct amounted to 'predatory pricing' and 'abuse of dominant position', under s. 3 (4) and s. 4 (2) (ii) respectively.

Since the informant argued that the OPs' dominant position was affecting competitors in the arena, it was necessary for the CCI to begin by identifying the relevant market. The CCI found the relevant geographical market of Sun Direct to be the entire territory of India since DTH services are agnostic to physical territory. This sharply contrasts the territorially defined nature of Cable distribution, such as that of Jak Communications which offer signals to subscribers only in parts of South India. Thus, CCI opined the DTH provider and the regional MSO operated in 'distinct and *distinguishable*' geographical markets. The CCI also saw the relevant product market of the two TV distributors in dispute to be different. Precisely because Sun Direct's services differed in product characteristics (i.e. channels in the packages it retailed), type of add-on services (like movies on demand) and interactive services (such as games and educational services), its offerings were not seen as substitutable to those of Jak Communications and other MSOs. Thus, CCI felt that the DTH distribution seemed to ostensibly cover many more products compared to those offered by the informant MSO, and thus, that Sun Direct was not vending interchangeable services. Within these definitions of the relevant markets, CCI reasoned Sun Direct could not abuse its dominant position because in the national market of DTH services, it was not the dominant or most dominant player, it being third in terms of subscriptions among six private DTH operators.

While the main order of *Jak Communications* found the DTH provider not guilty of contravening any sections of the Competition Act, 2000, the dissenting order illustrates why the issue of relevant market is more contentious than what immediately meets the eye.

The dissent averred that in defining the demarcations between geographical markets, it had not been considered that DTH services often customise their channel packages differently in different territories--- like Sun Direct did with its 'South India' and 'Rest of India' packages. Such grouping of channels is based on the popular language in the territory of sale, enabling DTH operators, while having a pan-India footprint, to cater to particular linguistic communities within a region of India. Even competing DTH distributors like Airtel Digital TV and Tata Sky retailed regional packages specific to TV homes in South India. The dissent recalled that s. 19 (5), (6), and (7) of the Competition Act require the Commission to give due regard to *local specification requirement*, consumer preferences, language, price of service, and existence of specialised producers, which in this case was the

'Tamil Freedom Package' offered by Sun Direct--- hence deemed to be considered interchangeable with regional MSOs' product offerings in the area where the dispute emerged. Consequently, the four states of South India were seen to be the market for the 'South India' package of Sun Direct. Doing so, the dissent inferred, would lead to Sun Direct revealing a dominant position in the service area that was being abused by way of unexplained low rates per channel.

Thus, the main order of *Jak Communications* found the relevant market to be the whole of India, and DTH services said to be in its own exclusive terrain.[34] The dissenting order problematised relevant market by pointing to the determining importance of language in constituting it, as also the ability of DTH operators to offer different language packages (i.e. different products retailed) in different regions of India. The dissent reasoned that since viewers in Indian states would be inclined to watch channels in their own regional languages, it was untenable to consider the geographic market being the country--- and therefore only the four states of South India could be seen as the relevant market.

The very next year, the CCI maintained in another case that the country was the relevant geographical market for DTH services, albeit on a different reasoning. In *Big CBS Networks & Anr* v. *Tata Sky Ltd* ('**BIG CBS**'),[35] the petitioner distributed a host of entertainment channels, while the OP was the DTH operator, Tata Sky Ltd., whose co-owner was a broadcaster competing with those of Informant broadcaster in some language segments.

Big CBS Networks had filed a case under s. 19 (a) of the Competition Act alleging abuse of dominant position by Tata Sky in contravention of s. 4 of the Act. It asserted that the DTH operator was charging it an exorbitant (five times over) carriage fee to transmit its channels. It submitted the relevant product market to be the 'service of broadcasting channels through DTH platform'. It further submitted that its channels catered to the English speaking urban population and therefore the *relevant geographical market* was 'service of broadcasting channels (including through DTH operators) in large urban market i.e. Delhi, Mumbai, Chennai, Hyderabad, Kolkatta, Bangalore and other important cities like Chandigarh, Kochi, Goa, Pune, Mangalore and state of Sikkim'.[36] According to BIG CBS, Tata Sky was having dominance in this market since it was the most widely used DTH

[34] Which is to say that the market for DTH services (to which Sun belongs) is different from the market of Cable provider (to which informant belongs).

[35] *BIG CBS Networks v Tata Sky Ltd.*, Competition Commission of India Case No. 36/2012. (BIG CBS Networks)

[36] *BIG CBS Networks*.

platform in metropolitan and other big cities where viewership of English channels was concentrated.[37]

The CCI opined that the relevant geographic market was the 'provision service of broadcasting of channels through DTH' i.e. the entire country. The plea of BIG CBS was rejected because it failed to submit cogent evidence to show that English channels were not telecast in other areas, or were not watched by non-urban populations. Consequently, the case for the dominant position, and therefore the possibility of its abuse, by the DTH operator across India was found untenable.

The issue of relevant market came up yet again in *Makkal Tholai Thodarpu Kuzhumam Ltd.* v. *Tamil Nadu Arasu Cable TV Corpn. Ltd.*[38] The Informant was the Tamil-language broadcaster, Makkal TV, whereas the OP was an MSO in Tamil Nadu, Arasu Cable, that was fully owned by the state government--- a unique case in India's TV distribution business. Thus, both parties were wholly operating in the same language market. Arasu Cable was carrying Makkal TV since September 2011, free of cost and in its S-band in 'S-4' channel. However, in 2015, to enhance revenues it decided to collect carriage fee from (free-to-air) broadcasters. Since this fee was very high for Mid and Hyper bands for free-to-air channels including Makkal TV, Arasu Cable was accused to have indulged in unfair and discriminatory practice through an abuse of its dominant position.

Although Makkal TV could be viewed by households subscribing to either DTH or Cable, CCI felt these two platforms could not be treated as being similar, or substitutable. Hence, it identified relevant product market to be that involved in the 'retransmission of channels through Cable TV Networks'--- i.e. channels distributed through Cable. As a corollary, the CCI further observed that the relevant geographic market was the territory where Cable distributors relayed Makkal TV--- which was the state of Tamil Nadu.[39] Combining both observations, the CCI ultimately held that the relevant market in the present case would be Cable distribution in state of Tamil Nadu.

Taken together, what do the three cases reflect on the problem of defining relevant geographical market?

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[37] ibid 2.

[38] *Makkal Tholai Thodarpu Kuzhumam Ltd. v Tamil Nadu Arasu Cable TV Corpn. Ltd.*, 2015 SCC OnLine CCI 162.

[39] Except Chennai, which was at that time covered under a different regulatory framework.

Ascertaining a relevant geographical market proved to be highly dependent on the types of distributors and types of products in specific areas. In the first dispute, the CCI judgement found the relevant geographical market to be the entire country--- despite the area of operation of the Cable distributor involved being only regional. From this stemmed CCI's further view that the distribution services of the DTH provider and regional MSO operated in separate product markets. The dissent rightly reasoned that it was untenable to view the entire country as the geographic market since the products offered by both, in the area of dispute, were likely to be interchangeable. In the second dispute, the CCI held the relevant geographic market to be the entire country. However, this was because the informants led by a multi-lingual broadcaster were unable to provide evidence on why English channels, such as its own, would not have viewers in regions of India outside metropolitan cities where the contesting DTH distributor operated. In the third dispute, between a regional Cable distributor and a smaller, single-language broadcaster, the relevant geographical market was effectively held by CCI to be the state of Tamil Nadu.

The circumstances of these three cases reflect the peculiarities of the TV landscape in India. The first case arose due to the capacity of *different TV distribution technologies*, despite having different physical boundaries of their service areas, to offer substitutable products. Along with the dissent, it thus illustrated how product and technology come together to shape the Indian TV landscape. This was to some extent also visible in the second case involving broadcasters and a DTH distributor, since it arose due to the characteristic fragmentation of TV broadcast markets overlapping with *geographical separation of their audiences*--- despite the ability of the concerned TV distributor to technologically integrate them. This is where the paucity of data necessary to thickly enumerate the market becomes crucial, as admitted in the judgement of *BIG CBS*. In comparison to the first two cases, the circumstances of the third case were less challenging to comprehend since it involved one broadcaster and one distributor operating in one well-defined linguistic and physical territory.

What these cases also suggest is that ascertaining relevant geographical market is contingent on accurately understanding the nature of the specific products in question. In this light, what unifies the circumstances of these cases, ostensibly about considerations of service area in market definition, is the role of language as a trait of the product being broadcast and distributed. In these three cases, this has varied from being Tamil, which has a regional, geographically-specific audience market, to English, whose audience is diffused across the country. The role of language emerges as central not only on the demand side--- i.e. what the audience prefers in linguistically and geographically bound, or separated, territories--- but also on the supply side, i.e. how distributing technology agnostic to geography enables curating product for specific linguistic audiences within this geography. Only the dissent in *Jak Communications* found these dynamics relevant to unpack. We are thus curious about the CCI's experiences in explicitly identifying the relevant product market, given India's multi-lingual broadcasting and multi-technology distribution environments.

V. The Substitutability of Distribution Services: Relevant Product Market

The relevant product market has been defined to consist of all those products or services that are regarded as interchangeable or substitutable by the consumer owing to the nature of the products or services, their prices and intended use.[40] This approach of the CCI seems to stem directly from an early definition of relevant product market in the European Union.[41]

Dish TV v. *Prasar Bharti* ('**Dish TV**')[42] involved Dish TV, India's first private DTH distributor, also having an affiliate in the Cable business (SITI Cable) and affiliates in broadcasting through a large number of news and entertainment channels (Zee News and Zee TV respectively) in several languages. The OP, Prasar Bharti, is the national public broadcaster providing TV channels through its Doordarshan network on the terrestrial and Cable & satellite modes. Doordarshan also provides a rent free DTH service. Consequently, the DTH distribution service and the Cable & Satellite broadcasts of Prasar Bharti competed respectively with Dish TV and its broadcast affiliates.

Dish TV approached CCI after Prasar Bharti refused to telecast its advertisements on Doordarshan National, a terrestrial channel, on a commercial basis. Neither did any of the other private DTH distributors refuse telecasting advertisements of Dish TV, despite being its competitor, nor was there

40 *Atos Worldline India (P) Ltd. v Verifone India Sales (P) Ltd.*, 2015 SCC OnLine CCI 57 .

41 In the European Union, a relevant product market is defined as follows: 'A relevant product market comprises of all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reasons of the products' characteristics, their prices and their intended audiences; Commission of the European Communities, 'Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law' (1997) Official Journal of the European Union, OJ C 372, 9 December 1997, 5.

42 *Dish TV v Prasar Bharti*, Competition Commission of India Case No. 44/2010.

anything in Doordarshan's Advertisement Code to stop such advertisements being telecast on Doordarshan National.

The CCI felt Dish TV had conceived of the relevant market as the viewership of the terrestrial broadcasts of Doordarshan National. However, CCI argued that in this instance the product in question was advertisement airtime, not the viewers of a particular channel. This suggests CCI's sensitivity towards recognising commercial TV entailing a 'dual product' market.

In traditional models of publicly or license-fee funded television, the product was media content, while the viewers were the consumers. This reflected traits of a single product market, akin to that of other standard economic products. However, advertising-driven commercial television (like that by private C&S TV broadcasters in India) operates in a dual product market: i.e. on the one hand, it entails a market for viewers, where the product is the content (i.e. programmes, news stories etc.), like in traditional public television; but simultaneously, there also exists a market for advertisements or airtime, wherein the product is the audience who are sold to advertisers (to provide revenues to produce the content).[43] In short, private C&S TV in India entails one market where content is sold to audiences, and another where audiences are sold to advertisers. Significantly, the dynamics of a dual product market could well create situations where an entity dominates one part of the product, audience share in the C&S TV market, and not the other part of the product, i.e. airtime share.

Thus, in this case, the CCI grappled with the consequences of the phenomenon of dual product market. Recognising the markets for audiences and airtime being related businesses, Dish TV claimed Prasar Bharti, the government-owned terrestrial broadcaster, leveraged its dominance in one market, that of audiences, to attain dominance in the other market, that of airtime. However, Dish TV was unable to present evidence to establish Prasar Bharti's dominant position in the relevant product market--- i.e. in the market for airtime. The CCI observed that while Doordarshan may be considered to dominate the market for content (i.e. programming) among terrestrial audiences, it did not dominate the market for airtime sales across both terrestrial (free-to-air) and C&S (subscription-based) broadcasting. Distinctions in the latter remind us of the reasoning behind the European Commission differentiating between pay-TV and free-to-air TV.[44]

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[43] Robert G. Picard, *Media Economics: Concepts and Issues* (Sage Publications, 1989) 17-19. For an early exposition of how media products differ from other goods, *see* Richard Collins, Nicholas Garnham, and Gareth Locksley, *The economics of television: The UK case* (Sage Publications, 1988).

[44] Just (n 30).

When the product gets identified correctly in disputes, then the other big factor comes into play: the substitutability of products. In *Yogesh Ganeshlaji Somani* v. *Zee Turner Ltd. Star* (‘**Shri Yogesh Ganeshlaji**’)[45] both the OPs were content aggregators; that is, they were wholesaling channels for one or more broadcasters, as bundles or otherwise, by negotiating on their behalf with MSOs and DTH distributors. The complainant argued that the planned joint venture by the two aggregators---where each involved a Cable distributor directly or via its affiliate---would lead to a trickle down, control effect. Since both the partnering entities had interests in the MSO segment, the fear was these aggregators would gradually bypass MSOs other than those associated with them, leading to eliminating LMOs other than the ones their MSOs preferred---and finally culminating in a restrictive, narrow choice of distribution networks for subscribing households.

The CCI held the businesses of aggregating and of distributing TV channels not being substitutes since they pertained to respectively the wholesale and retail markets of TV distribution. Consequently, the relevant product market in question here was that of ‘aggregators and distributors of Cable and DTH’ in India. The CCI felt this market was different from that of Cable and DTH services which it saw to be interchangeable and substitutable from the consumer side--- since they could switch between these different services.[46] Further, the use of ‘India’ as the geographical market was justified because the license provided to the aggregators was that of ‘India’ and their operations are not restricted to any state. Thus, the CCI saw the OP not capable of adversely affecting competition in the relevant market identified. The case of Shri Yogesh Ganeshlaji thus helps us to make a larger point about the CCI recognising the relevant market for aggregators and for distributors being different, despite both dealing in the same ‘product’.

In *Consumer Online Foundation* v. *Tata Sky Limited, Dish TV India Limited, Reliance Big TV Ltd. and Sun Direct TV Pvt Ltd.* (‘**Consumer Online Foundation**’),[47] the CCI held that DTH operators had deliberately developed a business model wherein customers had to buy the necessary DTH hardware from the operators. While this suggests that the CCI saw even rival DTH services not being perfect substitutes, for now our focus is on this judgement exemplifying different distribution technologies conveying different product markets.

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45 *Yogesh Ganeshlaji Somani v Zee Turner Ltd.*, 2013 SCC OnLine CCI 26 : (2013) 115 CLA 78. (Shri Yogesh Ganeshlaji).

46 *Shri Yogesh Ganeshlaji*, para 3.8.

47 *Consumer Online Foundation v Tata Sky Limited, Dish TV India Limited, Reliance Big TV Ltd. and Sun Direct TV Pvt Ltd.*, 2011 SCC OnLine CCI 12 : [2011] CCI 11.

In this dispute, the three DTH operators comprising the OP argued that Cable T.V., IPTV, and DTH services were the same product market as they could be substituted or interchanged. However, the CCI negated this view on substitutability by distinguishing between the three modes of transmission and holding them to be very different. While IPTV came through wires but on the internet, Cable TV was transmitted through wires and the services of MSOs, and DTH signals were received directly from the satellite and no other intermediate medium. Although the intended use of all the services were the same, the CCI noted that the prices of the three services were different; while DTH was costlier than IPTV and Cable, the technological character of all three are different since IPTV and Cable TV could not be seen in places without adequate broadband or cables. Moving to the demand side, CCI found Cable inspiring to lesser consumer satisfaction as limited number of channels were available, while vast number of channels could be viewed on DTH which also had better image quality. Thus, CCI held that customers too regarded DTH as a service that was distinct from IPTV and Cable TV.

With this in mind, the CCI reiterated that under s. 2(t), it was for the consumer to realise that the services are substitutable or interchangeable. Given all these points of difference and the letter of the Act, the CCI held that DTH constitutes a significantly different market and therefore a *separate* relevant product market vis-à-vis IPTV and Cable. While this part of the judgement was in public interest, it maintained the CCI's orthodox and un-nuanced view of the relevant geographical market of DTH being the whole of India--- as per *Jak Communications*, *Shri Yogesh Ganeshlaji*, and *Big CBS Networks*.

Looking back at the cases discussed, two grey areas seem to exist in market definition, viz. identifying the relevant product, and determining the substitutability of products.

In *Dish TV*, we see recognition of TV signals being distributed to consist of many different products but also see complications arising from the two different types of broadcast markets, terrestrial TV and C&S TV, operating in parallel in India--- which makes pinpointing the relevant product market a delicate proposition. This reminds us of the holding in another case where the CCI's judgement was not so delicate. In *Co-ordination Committee of Artist and Technicians of West Bengal Film and Television Industry* v. *Sajjan Kumar Khaitan,*[48] the majority judgement opined the relevant product

[48] *Co-ordination Committee of Artist and Technicians of West Bengal Film and Television Industry v Sajjan Kumar Khaitan,* 2014 SCC OnLine Comp AT 4 : 2014 Comp LR 329 (CompAT). The Co-ordination Committee was a joint platform of Federation of Cine

market to be the 'whole Film and TV Industry of West Bengal'. As opposed to this vague conception, the minority judgment saw the relevant market being that only of 'broadcast of TV serials'--- i.e. a particular subset of the former. When the matter went to COMPAT, it agreed with the minority judgment, squashing the rather broad definition of relevant product market in CCI's judgment.

In upholding the substitutability of Cable and DTH in *Shri Yogesh Ganeshlaji*, the CCI failed to recognise that DTH and Cable differ in product characteristics--- as per *Jak Communications*; it also failed to nuance that consumers' ability to switch between them was not a case of perfect substitution since they had to incur fresh and additional costs to invest in hardware (set top box) while replacing one with the other. The differing product types indicated by Cable and DTH were elaborated in *CCI* v. *Zero Coupon Optionally Convertible Debentures*.[49] In a case principally about the anti-competitive implications of a broadcast network being acquired by Reliance, CCI's judgement implicitly considered the two distribution technologies to be non-substitutable because Cable offered a smaller number of channels and lacked clarity on the actual subscriber base.

In Consumer Online Foundation, the CCI went into the technological and price attributes of DTH, Cable, and IPTV, to bring home the point about the competing but non substitutable nature of products/services in the TV distribution business. Further, and rather importantly, it spotlighted a crucial aspect of the Act--- that it was for the subscriber/audience to realise that the services are substitutable. One important distinction subscribers keep in mind, omitted in all judgements, is the mobility offered by DTH connection when subscribers move to a new address.[50] While this drives further the case for the non substitutability of Cable and DTH, it recalls the importance of debates in other media businesses on competing but non-substitutable products.

One such example would be the substitutability between fixedline (wired) and mobile (wireless) services in a comparable sector--- such as in the broadband business. In the broadband business, differences in price, speed, and reliability between fixedline/wired and mobile/wireless services can rightly reason these two being considered as competing but non-substitutable products. However, as differences in these attributes diminish over time, there

Technicians and the West Bengal Motion Pictures Artists Forum. The EIMPA was a regional association of film producers, distributors, and exhibitors from West Bengal.

49 *CCI v Zero Coupon Optionally Convertible Debentures*, 2012 SCC OnLine CCI 76.

50 Interviews conducted in Delhi and Patna under fieldwork directed by the author and Arshad Amanullah.

emerges an argument for such wired and wireless services to access the internet being considered substitutable, since users and potential subscribers see them at par, as research in Turkey reveals.[51] In contrast, the prices of wired (Cable) and wireless (DTH) services to access C&S TV India have remained noticeably different, and hence continue to be a factor in TV subscribers refusing to see them as substitutes. The case of broadband access also reveals the importance of time--- both technological change and market maturity---in imparting the expected consistency in jurisprudence on market definition.

To accurately decipher the relevant product market, competition regulators must carefully delve into the attributes of seemingly similar, and therefore apparently substitutable, products. The CCI reflected such a nuance in its judgements concerning another media business, that of cinema exhibition. In *Film & Television Producers Guild of India* v. *Multiplex Assn. of India* the CCI construed (and I would agree) single-screen theatres operating in a different product market than multiplex theatres--- where several movies are exhibited at the same time and whose tickets are many times higher than those at the former.[52] This then aptly echoes CCI's reasoning in Consumer Online Foundation where it successfully grasped the complexities of competing but non-substitutable services in defining relevant product markets.

VI. Market Definition in a Complex Milieu: Conceptual and other Conundrums

Case law of the CCI vividly demonstrates that determining the *relevant market* in TV distribution in India is a slippery slope. This in itself is not very unique given that the early decades of anti-trust jurisprudence in Cable distribution in other countries has also reflected this, such as in the USA.[53] What is rather special to India is the *co-determination of market definition* by the interplay between the circumstances of a case, and an accurate reading of the characteristics of the technology and service area.

Our meandering narrative of cases on relevant market in India's complex C&S TV landscape offers insights at two levels: conceptual and empirical.

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[51] Fuat Oğuz, K. Ali Akkemik, and Koray Göksal, 'Toward a wider market definition in broadband: The case of Turkey' (2015) 37 Utilities Policy 111.

[52] *See Film & Television Producers Guild of India v Multiplex Assn. of India.,* 2013 SCC OnLine CCI 89 : 2013 Comp LR 19 (CCI).

[53] *See* Michael Botein, 'Cable Television Franchising and the Antitrust Laws: A Preliminary Analysis of Substantive Standards' (1984) 36(3) Federal Communications Law Journal 253.

Foremost, it brings to light some conceptual hiccups in construing and adjudicating definitions of relevant market in TV distribution.

We recognise that the twin segments of DTH and Cable illustrates a case of inter-related markets occurring between the demand and supply side of TV signals. The TV distribution business reflects competition among various Cable operators and DTH operators as also, *often simultaneously*, between these two technological platforms, i.e. wired and wireless TV distributors. This echoes the market dynamics of the records industry during the 1900s and the video cassette business during the 1980s where rivalry between individual companies simultaneously marked a competition between rival technological formats.[54] Furthermore, in TV distribution, this competition unfolds at two levels. On the one hand, Cable and DTH firms compete, like in any wholesale market, to attract TV channels of broadcasters; on the other, they vie for households, akin to in any retail market, to buy C&S TV signals. Competition between firms at both levels unfolds in a manner such that their success in the first (wholesale) market tempers their operations in the second (retail) market---and therefore their margins harvested in both.

Successful and accurate competition adjudication tends to share two traits: a precise identification of the product likely to be relevant, and a clear assessment of the workings of the substitutability between *seemingly competing* distribution services. Our narrative has highlighted problems in identifying markets in the supply of specified products---as illustrated by the case of *Dish TV* over relevant market in advertising airtime in the market for terrestrial TV. Equally, we spotlighted problems arising from a partial understanding of the similarities/differences between competing technologies of distributing television signals, best indicated in *Jak Communications*. Taken together, perhaps both these boil down to a fundamental conundrum: are Cable and DTH perfect substitutes in India's TV distribution market, and if so under what competitive circumstances and in which areas of operation?

This leads us to ponder over the impediments in transporting orthodox conceptions of market definition to complex television markets like India. Thus, in dealing with market definition, we stumble upon the peculiar contexts and characteristics of TV distribution in India that give rise to such conceptual challenges.

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[54] *See* Vibodh Parthasarathi, 'The Evolution of an Early Media Enterprise: The Gramophone Company in India, 1898-1912' in Ravi Sundaram (ed) *No Limits: Media Studies from India* (Oxford University Press, 2013); and, Michael A. Cusumano, Yiorgos Mylonadis, and Richard S. Rosenbloom, 'Strategic Maneuvering and Mass-Market Dynamics: The Triumph of VHS over Beta' (1992) 66(1) The Business History Review 51.

What upsets the neatness of the economic premise upon which policy frameworks and regulatory adjudication are based, is the fact that the *retail market of TV distribution in India is not characterised by perfect competition,* as commonly assumed in textbooks.[55] Textbook renditions of competition demands that C&S TV subscribers within a geography are able to compare offerings by rival Cable distributors as also rival DTH distributors. However, in India there is no real choice for potential subscribers within an area between rival providers of Cable signals, as each residential locality (be it in cities or rural areas) is effectively catered to by one LMO. Intriguingly, this phenomenon was evident in the early years of the Cable business[56] but remains so 20 years later--- and despite the much talked about goal of mandatory digitalisation to usher in choice for TV audience.[57] In short, at the last mile of TV distribution in India, all retail boroughs effectively consist of one Cable distributor, or a 'natural' monopoly.

On its part, DTH distribution also reflects a lack of perfect competition, but for another reason--- the lack of enforcement of interoperability amongst competitors. While the CCI's judgements are rarely informed by this, in the odd case where they are, it finds the absence of interoperability due to DTH operators' deliberately seeking to lock-in their subscribers--- thereby making subscribers' migration between competing operators an expensive proposition, as well articulated in Consumer Online Foundation. The unwillingness of DTH distributors to comply with interoperability protocols, and the silence of the government to enforce such protocols, nullify the empirical assumptions underlying the concept of substitutability. Of course this adversely effects competition in this important consumer-facing business, as the CCI's investigation itself confirmed.

What thus becomes blatant is that the Cable and DTH segments of the retail market in TV distribution display imperfect competition, albeit constituted in different manners. This makes the endurance of arguments about the substitutability of Cable and DTH, in the CCI judgements and assumptions by policymakers alike, even more surprising.

The scenario cultivated by the absence of perfect competition and of the conditions enabling substitutability gets further complicated when we look at other traits of the TV distribution business. Primary here are the existence of *multiple and overlapping distribution markets* within the country based

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55 For instance, Jeffrey C. Ulin, 'Television Distribution', *The Business of Media Distribution: Monetizing Film, TV and Video Content in an Online World* (Focal Press, 2010).

56 Naregal (n 17).

57 Parthasarathi, Amanullah, and Koshy (n 10).

on language, geography, and technology. The first factor reflects, language, the 'embeddeness', to evoke Polanyi,[58] of the business of TV distribution in Indian society--- i.e. the extent to which distribution markets are constrained by non-economic institutions, as underscored for media markets more generally in India.[59]

Markets for TV Distribution in India are simultaneously defined by the media products retailed---itself determined by language---and the geography of retail, i.e. the spatial operations of LMOs, MSOs, and DTH providers. Thus, within a particular area of operation, distributors may not necessarily compete to retail uniform products; they may well have different or customised linguistic offerings of TV signals, which could be dependent on the technology used by competing distributors. These overlapping dynamics, in turn, have contributed to congenitally *fragmenting the TV distribution market along multiple axes*. Such fragmentation invites quibbles with orthodox conceptions of market definition--- an invitation which only the dissent in *Jak Communications* accepted to take on. It is however heartening that the logic of the dissent, i.e. the need for the so called 'national' market to be segregated, was echoed by the CCI in another case, albeit not pertaining to distribution.[60] There the competition regulator astutely argued for disagregating the so called 'national' market for broadcasting, since the consumption of the product in question (i.e. advertisements) was based on evidence (i.e. viewership surveys) that excluded rural areas and small towns.

What our analyses of the corpus of cases has also managed to achieve is to tease out the methodological challenges of market definition instigated by the media milieu of India.

Of principal import is the challenge arising from the *complex overlap of the linguistic, geographical, and technological dynamics of TV distribution in India*--- and the resultant multiple fragmentations of distribution markets. These features were most readily visible in the circumstances of *Big CBS* and *Dish TV*. They make the legal and economic perceptions of the TV distribution market extremely fuzzy, since they require consideration of competing constraints within and across a series of overlapping and layered markets.

We have additionally learnt how the veracity of market definition could be undermined by rapid technological changes. What is relevant here is not only

[58] Karl Polanyi, *The Great Transformation: Political and Economic Origins of Our Time* (2nd edn, Beacon Press 2001).

[59] *See* Parthasarathi (n 31).

[60] See, *Prasar Bharati v TAM Media Research (P) Ltd.*, 2016 SCC OnLine CCI 15.

the proliferation of new forms of production organisation---such as geographically agnostic, wireless distribution platforms like DTH---but changes entailing their business organisation, in response to the peculiar landscape in India. In short, considerations on market definition must be agile to strategic initiatives by distributors catalysed by the possibilities offered by new(er) distribution technologies. The judgement in *Jak Communication* seemed oblivious to how a 'national' DTH operator could distribute customised packages of TV signals for specific linguistic regions, as duly pointed out by the dissent.

This suggests conceptions of market definition in TV distribution in India are confronted with not only methodological challenges but those concerning the enumeration of the field of distribution, as discussed above. Revisualising textbooks conceptions of market definition will have to consider, rather centrally, the peculiar dynamics of the TV distribution business in India. Such considerations could benefit from recent scholarship visualising the media economy as a broad epistemic construct, which in reality contains a variety of distinct markets or/and sub-markets.[61]

VII. Conclusion

Following a decade of incremental demonopolisation and deregulation during the 1990s, the CCI was envisaged as a quasi-judicial body to curb the negative fallouts of competition across diverse sectors. This demanded competencies in, inter alia, market definition that are not only interdisciplinary but also informed about the peculiarity of products and commercial geographies pertaining to a raft of businesses.

In competition-oriented economic systems, antitrust protocols have traditionally operated alongside coherent statutory protocols. But in the media business of India, these protocols are invariably weak in their conception and design, and uneven in their implementation. Moreover, regulatory protocols are often marked by an incomplete appreciation of the complexity of India's media milieu, and therefore that of the social risks imparted by the unorthodox market behaviour of media companies.

While some cases in the corpus analysed stemmed from disputes arising from shallow compliance with existing regulatory protocols, few others arose due to the abject absence of such protocols. On their part, the trajectory of CCI's adjudication reflects the desire to redress such regulatory

[61] Vibodh Parthasarathi and Adrian Athique, 'Market matters: Interdependencies in the Indian Media Economy' (2020) 42 (3) Media, Culture & Society 431.

loopholes. In doing so, however, the competition regulator often confronts the peculiarities of the distribution business, which in some instances it is unable to comprehensively appreciate. In such scenarios, the CCI's remit of *ex post* regulation risks enhancing not only regulatory costs but also costs borne by the subscriber-audience. Whether this calls for sectoral regulators to robustly consider, and be empowered to enact, *ex ante* regulation is a conundrum as globally debated as that of market definition.